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Deposited in DRO:

17 June 2014

Version of attached file:

Accepted Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

Masterman, R. (2013) 'Deconstructing the mirror principle.', in The United Kingdom's statutory Bill of Rights : constitutional and comparative perspectives. Oxford: Oxford University Press, pp. 111-137. Proceedings of the British Academy. (183).

Further information on publisher's website:

<http://ukcatalogue.oup.com/product/9780197265376.do>

Publisher's copyright statement:

This is a draft of a chapter that was accepted for publication by Oxford University Press in the book 'The United Kingdom's statutory Bill of Rights : constitutional and comparative perspectives' edited by Roger Masterman and Ian Leigh and published in 2013.

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Part II—Domestic Protections within a European Framework

Chapter 5

Deconstructing the Mirror Principle

Roger Masterman*

Introduction

Despite lacking a clear heritage in the provisions of the Human Rights Act (hereafter HRA),¹ the “mirror principle”—the broad notion that domestic human rights protections under the HRA should replicate the protections afforded to those same rights by the European Court of Human Rights—has been a pervasive influence on the judicial interpretation, and application, of the Act.² The mirror metaphor captures a number of distinct strands of judicial reasoning in rights cases. First, it speaks to the approach taken by courts seeking to determine how the Strasbourg jurisprudence should be ‘taken into account’ and thereby translated into domestic law under the “flexible” terminology of s.2(1) HRA;³ with the judicial suggestion that “clear and constant” jurisprudence of the Strasbourg organs should generally be “followed”⁴ bringing a degree of predictability to the broad discretion available to courts under that

* My thanks are due to Merris Amos, David Mead, Gavin Phillipson and Alison Young for their comments on a draft. Any errors and omissions are, of course, my own.

¹ Section 2(1) HRA provides: “A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights, (b) opinion of the Commission given in a report adopted under Article 31 of the Convention, (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or (d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.”

² The phrase “mirror principle” is Jonathan Lewis’: J. Lewis, “The European Ceiling on Rights” [2007] P.L. 720. See also: R. Masterman, “Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the ‘Convention Rights’ in Domestic Law” in H. Fenwick, G. Phillipson and R. Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2007); J. Beatson, S. Grosz, T. Hickman, R. Singh and S. Palmer, *Human Rights: Judicial Protection in the United Kingdom* (London: Sweet and Maxwell, 2008), pp.40-45.

³ S. Tierney, “Devolution Issues and s.2(1) of the Human Rights Act 1998” [2000] E.H.R.L.R. 380, 392.

⁴ *R. (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 A.C. 295 at [26] (Lord Slynn of Hadley); *R. (on the application of Anderson) v Secretary of State for the Home Department* [2003] 1 A.C. 836 at [10] (Lord Bingham).

provision. Secondly, the mirror principle concerns the range and scope of the rights protected under the HRA,⁵ with the injunction that domestic courts seek to provide “no more, but certainly no less”⁶ protection than would be provided by the Strasbourg court itself seeming to curb the ability of domestic courts to extend (or reduce) the scope of the protections provided by “the Convention Rights” beyond that countenanced by the European Court of Human Rights. Finally, the mirror model of interpretation provides a lens through which the entire remedial structure of the HRA can be viewed, giving rise to the suggestion that the Act is no more than a cipher through which the rights and remedies which would otherwise be available only at Strasbourg are duplicated in domestic law.⁷

At the level of individual decision-making the mirror principle holds the potential to wield a regulating influence over the exercise of judicial discretion in HRA adjudication, limiting the scope for domestic courts to depart from Strasbourg authority and the breadth of those rights afforded protection. At the constitutional level, the principle facilitates access to the Strasbourg level of protection in domestic courts, but—through the denial of a distinctly domestic content to rights protections under the HRA—impedes the ability of the HRA to operate as a proto-Bill of Rights for the United Kingdom.⁸ The mirror principle aspires to both descriptive and normative characteristics; it is at once an encapsulation of what many courts *have* done in seeking to reconcile domestic law with the demands of the Convention Rights under s.2(1), and for many—in the wider debate over the constitutional purpose of the HRA—a prescription of what the courts *should* do in order to give effect to the Act as a whole.

Yet in reality, the inflexible relationship between “the Convention Rights” as given effect under the HRA and those rights as policed by the European Court of Human Rights that is at the heart of the mirror principle—strictly construed—is neither a requirement of the HRA itself, nor of the Convention: s.2(1) HRA requires only that domestic courts “take into account” relevant Strasbourg authority in determining questions relating to the Convention

⁵ Human Rights Act 1998, s.1(1).

⁶ *R. (on the application of Ullah) v Special Adjudicator; Do v Immigration Appeal Tribunal* [2004] UKHL 26; [2004] 2 A.C. 323 at [20] (Lord Bingham).

⁷ *R. (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58; [2008] 1 A.C. 332 at [55] (Lord Rodger of Earlsferry); *R. (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 A.C. 100 at [29] (Lord Bingham).

⁸ F. Klug, “A Bill of Rights: Do we need one or do we already have one?” [2007] P.L. 701, 706-708.

Rights,⁹ while the application of the margin of appreciation by the Strasbourg court ensures that the uniform application of the Convention throughout the Council of Europe is ultimately an impossibility.¹⁰ In spite of the linguistic vagary of s.2(1),¹¹ and the difficulties associated with using the Strasbourg case-law as a blueprint for a national rights jurisprudence,¹² the prevailing judicial approach to the interpretation of s.2(1) HRA during the first ten years of its operation can be stated succinctly: “[f]ollowing Strasbourg will be the norm and departing from it will be the exception.”¹³

In the early years of the HRA’s operation, indications were given that domestic courts might depart from potentially applicable Strasbourg authority where it could be shown that the European Court had “misunderstood” the relevant domestic law,¹⁴ where the Strasbourg organs had received insufficient guidance on the point in question to form a conclusion¹⁵ or where application of the relevant authority would “compel a conclusion fundamentally at odds with the distribution of powers under the British constitution.”¹⁶ Actual exceptions to the general presumption in favour of adherence to Strasbourg authority were more difficult to find;¹⁷ at least one commentator was able to suggest, in research published in 2007, that so few were the occasions on which the courts had distinguished or departed from relevant Strasbourg authority the supposed exceptions to the mirror principle existed in theory alone.¹⁸ The weight of evidence in favour of a dilution of the mirror principle has since steadily grown. In a series of cases concerning the impact of Article 8 on possession proceedings, the

⁹ An amendment which would have seen courts bound to adhere to Strasbourg decisions was tabled, and rejected, during the parliamentary progress of the Human Rights Bill (HL Debs, Vol.000, Col.514, 18 November 1997).

¹⁰ *Handyside v United Kingdom* (1979-80) 1 E.H.R.R. 737 at [48].

¹¹ Cf. Lord Irvine of Lairg, “A British Interpretation of Convention Rights” [2012] P.L. 237, 238-239: “The terms of this provision are simple ... The meaning of the provision is clear.”

¹² On which see: R. Masterman, “Taking the Strasbourg Jurisprudence into Account: developing a “municipal law of human rights” under the Human Rights Act” (2005) 54 I.C.L.Q. 907, 915-918.

¹³ A. Kavanagh, “Special Advocates, Control Orders and the Right to a Fair Trial” (2010) 73 M.L.R. 836, 845.

¹⁴ *R. v Lyons (No.3)* [2002] UKHL 44, [2003] 1 A.C. 976 at [46] (Lord Hoffmann).

¹⁵ *R. v Spear* [2002] UKHL 31; [2003] 1 A.C. 734 at [12] (Lord Bingham).

¹⁶ *R. (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 A.C. 295 at [76] (Lord Hoffmann).

¹⁷ R. Masterman, ‘Section 2(1) of the Human Rights Act 1998: Binding Domestic Courts to Strasbourg?’ [2004] P.L. 725.

¹⁸ J. Lewis, “The European Ceiling on Rights” [2007] P.L. 720, 731.

ability of domestic courts to engage in a “creative dialogue”¹⁹ with the European Court on the meanings of the rights protected by the HRA has been amply demonstrated.²⁰ The House of Lords decision in *Re P* demonstrates that in those areas in which the European Court has held the margin of appreciation to apply the mirror metaphor cannot coherently operate: “the question is one for the national authorities to decide for themselves”²¹ in accordance with the principles underpinning the relevant Convention rights(s) and informed by what authority is discernable from the Strasbourg case-law. Most strikingly, the decision of the United Kingdom Supreme Court in *R. v Horncastle* provides perhaps the most compelling authority to date for the suggestion that domestic courts will not simply apply even relevant and clear Strasbourg case-law as a matter of course, and in so doing provides further implicit support for the suggestion that in their meaning and application, the domesticated Convention Rights might well deviate from their Strasbourg cousins.²²

But these decisions by no means mark the complete abandonment of the mirror principle as either a constraint on the scope of the rights protected under the HRA, or as a factor governing judicial interpretation of the overall HRA scheme.²³ The notion that the domestic court acting pursuant to the HRA does so as a local proxy for the European Court of Human Rights runs deep. As a result the presumption that the “clear and constant” jurisprudence of the Strasbourg organs should ordinarily be followed continues to resonate in UK Supreme Court decisions.²⁴ So too does the suggestion that courts should not afford a

¹⁹ Lord Steyn, “2000-2005: Laying the foundations of human rights law in the United Kingdom” [2005] E.H.R.L.R. 349, 361. See also the chapter by Merris Amos in this volume.

²⁰ The relevant domestic authorities are: *Harrow LBC v Qazi* [2003] UKHL 43; [2004] 1 A.C. 983; *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 A.C. 465; *Doherty v Birmingham CC* [2008] UKHL 57; [2009] 1 A.C. 367; *Manchester CC v Pinnock* [2010] UKSC 45. The relevant European Court of Human Rights decisions are: *Connors v United Kingdom* (2004) 40 EHRR 189; *McCann v United Kingdom* (2008) 47 EHRR 913; *Kay v United Kingdom*, Application No.37341/06 (21 September 2010). For discussion see: I. Loveland, “The shifting sands of Article 8 jurisprudence in English housing law” [2011] E.H.R.L.R. 151.

²¹ *In Re P* [2008] UKHL 38; [2009] 1 A.C. 173 at [31] (Lord Hoffmann). On which see: J. Lewis, “*In Re P and others*: an exception to the ‘no more, certainly no less’ rule” [2009] P.L. 43.

²² *R. v Horncastle* [2009] UKSC 14; [2010] 2 A.C. 373. See now: *Al-Khawaja v United Kingdom* (2012) 54 E.H.R.R. 23.

²³ T. Cross and C. Knight, “Public Law in the Supreme Court 2009-2010” (2010) 15 J.R. 299, 301. Cf. J. Wright, “Interpreting section 2 of the Human Rights Act 1998: towards an indigenous jurisprudence of human rights” [2009] P.L. 595.

²⁴ *Manchester City Council v Pinnock* [2010] UKSC 45; [2010] 3 W.L.R. 1441 at [48] (Lord Neuberger of Abbotsbury MR): “Where ... there is a clear and constant line of decisions whose effect is not inconsistent with

more generous interpretation of “the Convention Rights” domestically than that afforded by the European Court of Human Rights.²⁵ It follows that the sentiments expressed by Lord Rodger of Earlsferry in the House of Lords decision in *Secretary of State for the Home Department v AF*— “[e]ven though we are dealing with rights under a United Kingdom statute, in reality, we have no choice: *Argentorum locutum, iudicium finitum*—Strasbourg has spoken, the case is closed”²⁶—have by no means been erased from history.

This chapter questions the continuing utility of the mirror principle as a guiding interpretative tool, arguing that it can increasingly be seen to provide an inadequate account of judicial practice under the HRA and—more fundamentally—that it provides an unstable normative foundation for the shape and content of the HRA’s rights jurisprudence.

The Origins of the Mirror Principle

The origins of the mirror principle lie in the unclear status of “the Convention rights” as legal standards in the domestic context.²⁷ This uncertainty is traceable to the fact that while the HRA itself is a creation of the United Kingdom Parliament, its implications cannot be fully appreciated without reference to the international treaty (and its attendant case-law) to which the Act was designed to give “further effect.” As a result, the Convention standards enjoy a split personality; they are at once enforceable in domestic law under the provisions of the HRA, and standards of international law by which the conduct of the United Kingdom, as a state party to the European Convention on Human Rights, can be assessed.²⁸

some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line.” See also: *Cadder v HM Advocate* [2010] UKSC 43; [2010] 1 W.L.R. 2601 at [45]-[51] (Lord Hope of Craighead).

²⁵ *Ali v Birmingham City Council* [2010] UKSC 8; [2010] 2 A.C. 39 at [38] (Lord Hope); *HM Treasury v Ahmed* [2010] UKSC 5; [2010] 2 A.C. 534 at [74] (Lord Hope); *Ambrose v Harris* [2011] UKSC 43 at [17]-[20] (Lord Hope) (Cf. at [126]-[130] (Lord Kerr)).

²⁶ *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28; [2010] 2 A.C. 269 at [98] (Lord Rodger of Earlsferry). For a specific analysis of the role of s.2(1) HRA to this case see: A. Kavanagh, “Special Advocates, Control Orders and the Right to a Fair Trial” (2010) 73 M.L.R. 836, 843-847.

²⁷ For a detailed discussion of the uncertain constitutional status of the HRA itself see: T. Hickman, *Public Law after the Human Rights Act* (Oxford: Hart Publishing, 2010), pp.24-49.

²⁸ See: A. Kavanagh, “Strasbourg, the House of Lords or Elected Politicians: who decides about rights after *Re P?*” (2009) 72 M.L.R. 828, 834-836.

While s.2(1) of the Act directs that courts to “take into account” decisions of the Strasbourg organs when “determining a question which has arisen in connection with a Convention right,” it gives no guidance as to the weight—precedential, persuasive or otherwise—to be attributed to those decisions in HRA adjudication. The text of the HRA lends support to the view that the meanings given to “the Convention Rights” in the domestic context cannot be *completely* divorced from the meanings attributed to those rights by the Strasbourg Court— “the Convention Rights” provide the legal standards against which statutes and public authority activities are to be tested²⁹—but it by no means follows that the application of the HRA is inescapably and inflexibly tied to *only* the meanings of the Convention articulated by the Strasbourg bodies.³⁰ The HRA clearly contains meaning that is—and should be—entirely independent of the requirements of the rights to which it gives further effect.

In giving effect to “the Convention Rights” under the HRA, the interpretational difficulty faced by domestic courts therefore lies in the question of whether the nature of those rights as they apply in the domestic context differs in any way from those rights as enforced by the European Court of Human Rights. Do the Convention Rights as applied under the Human Rights Act possess the exact same characteristics in domestic law as they would when applied by the Strasbourg court? Or has their transition into the domestic context—via the HRA—altered those characteristics in some way? Responses to these questions are central to understanding the HRA, and have manifested themselves across a spectrum of judicial opinion under which the HRA is variously viewed as a conduit through which those rights available to applicants at Strasbourg can be realised in domestic law,³¹ as a mechanism which seeks to blend Convention and common law protections for rights³² and as an instrument which has created anew a distinctly domestic species of legal rights.³³

²⁹ Sections 3(1) and 6(1) HRA 1998.

³⁰ As Lord Irvine argued during the parliamentary debates on the Human Rights Bill, “our courts must be free to try to give a lead to Europe as well as to be led” (HL Debs, vol.583, col.514 (18 November 1997)).

³¹ For example: *R. (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58; [2008] 1 A.C. 332 at [55] (Lord Rodger of Earlsferry); *R. (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 A.C. 100 at [29] (Lord Bingham).

³² For example: *Runa Begum v Tower Hamlets London Borough Council* [2002] 2 All ER 668 at [17] (Laws LJ): “... the court’s task under the HRA ... is not simply to add on the Strasbourg learning to the corpus of English law, as if it were a compulsory adjunct taken from an alien source, but to develop a municipal law of human rights by the incremental method of the common law, case by case, taking account of the Strasbourg jurisprudence as HRA s.2 enjoins us to do.”

The dominant approach towards the construction and application of s.2(1) HRA has tended towards the conservative end of that spectrum, displaying a clear hesitance on the part of the courts to find meaning in the domesticated “Convention Rights” that cannot be traced back to their Strasbourg counterparts. Domestic courts have—for the most part—taken their lead from, and have been reluctant to exceed, the protections afforded by the European Court of Human Rights. The origins of this incorporationist approach can be found in the speech of Lord Slynn in the House of Lords decision in *Alconbury*.³⁴ In that decision, Slynn indicated that “in the absence of some special circumstances ... clear and constant jurisprudence of the European Court of Human Rights”³⁵ should be followed, and, in so doing, effectively established a rebuttable presumption in favour of applying relevant Strasbourg case-law in HRA decision-making.³⁶

If *Alconbury* confirmed that domestic case-law should mirror its Strasbourg counterpart, then the decision of the House of Lords in *R. (on the application of Ullah) v Special Adjudicator* extended that approach to the scope of the substantive protections afforded under the HRA. While, in a now famous passage, Lord Bingham was prepared to countenance departure from Strasbourg jurisprudence, the end result of such a course of action should not—he stressed—result in the expansion (or indeed reduction) by the *courts* of protections afforded at the domestic level. Lord Bingham argued:

³³ For example: *R. (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 A.C. 1312 at [44]-[45] (Lord Scott); *In Re McKerr* [2004] UKHL 12 at [65] (Lord Hoffmann): “Although people sometimes speak of the Convention having been incorporated into domestic law, that is a misleading metaphor. What the Act has done is to create domestic rights in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention ... their meaning and application is a matter for domestic courts, not the court in Strasbourg.”

³⁴ *R. (on the application of Alconbury Developments and others) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 A.C. 295.

³⁵ *R. (on the application of Alconbury Developments and others) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 A.C. 295 at [26] (Lord Slynn). See also: *R. (on the application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 A.C. 837, at [18] (Lord Bingham); *R. (on the application of Amin) v Secretary of State for the Home Department* [2003] UKHL 51; [2004] 1 A.C. 653 at [44] (Lord Slynn).

³⁶ A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009), p.146.

... a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention Right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.³⁷

The cumulative effect of the “clear and constant” and “no more, but certainly no less” lines of reasoning is to attempt to provide structure to the discretion available to courts when considering the precedential force of Strasbourg decisions, and to place limitations on the scope of the protections that might be afforded to “the Convention Rights” under the HRA. Both strands of reasoning—that domestic courts should generally apply both Strasbourg *case-law* and Strasbourg *standards*—are consistent with a broader reading of the HRA which posits that the primary function of the Act is to make accessible in domestic courts only the rights and remedies which would otherwise be available to applicants at the Strasbourg level.³⁸

In its “wider application,”³⁹ therefore, the mirror metaphor is argued to extend to the interpretation of the HRA as a whole. In *R. v Secretary of State for Foreign and Commonwealth Affairs, ex parte Quark Fishing*, Lord Nicholls suggested that the combined effect of ss.6 and 7 HRA was to “mirror in domestic law the treaty obligations of the United

³⁷ *R. (on the application of Ullah) v Special Adjudicator; Do v Immigration Appeal Tribunal* [2004] UKHL 26; [2004] 2 A.C. 323 at [20] (Lord Bingham).

³⁸ *R. (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 A.C. 100 at [29]. See also: *R. v Secretary of State for the Home Department, ex parte Greenfield* [2005] UKHL 14; [2005] 1 W.L.R. 673 at [19] (Lord Bingham); *R. (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57; [2006] 1 A.C. 529 at [24] (Lord Bingham) at [34] (Lord Nicholls); at [88] (Lord Hope); *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 A.C. 167 at [8].

³⁹ *In Re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 A.C. 173 at [79] (Lord Walker of Gestingthorpe).

Kingdom in respect of the corresponding articles of the Convention and its protocols.”⁴⁰
Drawing support from the views of Lord Hope in *Wallbank*,⁴¹ he continued:

The [Human Rights] Act was intended to provide a domestic remedy where a remedy would have been available in Strasbourg. Conversely, the Act was not intended to provide a domestic remedy where a remedy would not have been available in Strasbourg.⁴²

In *Al-Jedda*, Lord Rodger appeared to broadly agree, noting that the task of the domestic court operating under the HRA was to “assess how a claim by the appellant ... would fare before the European Court of Human Rights.”⁴³ Both perspectives arguably minimise the distinctively domestic aspects of the HRA, viewing the Act as an instrument enabling access to rights and remedies which would in its absence only be available through recourse to Strasbourg. In cases such as *Quark* and *Al-Jedda*, in which the territorial integrity of the Convention—a matter falling within the clear competence of the European Court of Human Rights—was at issue, such an approach is entirely defensible. But it by no means follows that the same considerations should apply in determining the reach of “the Convention rights” given specific effect by the HRA. Extending the mirror metaphor so that it holds the potential to exert influence over the entire substantive and remedial structure put in place by the HRA, elevates the principle to the status of a virtual tenet of constitutional interpretation. On this reading, the HRA functions not as a proto-Bill of Rights, but simply to span the gap between national law and those rights and remedies which would otherwise be enforced by

⁴⁰ *R. (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57; [2006] 1 A.C. 529 at [34] (Lord Nicholls).

⁴¹ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 A.C. 546, 564, [44]: “... [the] purpose of ... sections [6 and 7 HRA] is to provide a remedial structure in domestic law for the rights guaranteed in the Convention.”

⁴² *R. (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57; [2006] 1 A.C. 529 at [34] (Lord Nicholls). Lord Bingham, at [25], advanced a similar perspective, suggesting that “the purpose of the 1998 Act was not to enlarge the field of application of the Convention but to enable those subject to the jurisdiction of the United Kingdom and able to establish violations by United Kingdom public authorities to present their claims in the domestic courts of this country and not only in Strasbourg.”

⁴³ *R. (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58; [2008] 1 A.C. 332 at [55] (Lord Rodger).

the European Court of Human Rights. Domestic courts, in turn, operate as local “agents or delegates of the ECHR”⁴⁴ rather than autonomous constitutional actors changed with giving further effect to the Convention standards at the national level.

The Merits of Reflection

The mirror approach to the Strasbourg case-law and meanings of “the Convention rights” under the HRA can be defended on both pragmatic and constitutional grounds. At a practical level, an adherence to the mirror principle brings clear benefits for litigants in HRA cases; the relatively stable relationship between the Strasbourg jurisprudence and domestic law that the mirror metaphor promotes not only displays respect for the findings of the Strasbourg court,⁴⁵ but also contributes to greater certainty for both victims of purported infringements and for public body respondents. The principle dictates that clear, constant and relevant Strasbourg reasoning will generally be adopted, and applied, by a domestic court, and holds that public bodies should not be expected to uphold standards of rights protection that exceed those countenanced by the European Court of Human Rights. The obligations to adhere to “clear and constant” jurisprudence, and to provide no higher (or lower) standard of protection than would be afforded at Strasbourg, therefore promote legal certainty at the domestic level, and—in providing a protection which does not fall below the Strasbourg baseline—reduce the potential for an applicant to appeal successfully to the European Court of Human Rights.

The mirror principle might also be defended on constitutional grounds. From a judicial perspective, the arguments in favour of the mirror approach—given ongoing controversies over the counter-majoritarian nature of rights adjudication—are easily appreciated. First, an adherence to the principle can be argued to empower domestic courts. By tying the development of “the Convention Rights” in national law as closely as possible to those rights as defined at Strasbourg, domestic courts legitimise their actions when, for instance, adopting “strained” interpretations or reading in implied terms or additional words under s.3(1),⁴⁶ or finding public body activity to have contravened the standards required by

⁴⁴ Lord Irvine of Lairg, “A British Interpretation of Convention Rights” [2012] P.L. 237, 238.

⁴⁵ *R. (on the application of Ullah) v Special Adjudicator; Do v Immigration Appeal Tribunal* [2004] UKHL 26; [2004] 2 A.C. 323 at [20] (Lord Bingham); *Ahmed v HM Treasury* [2010] UKSC 5; [2010] 2 A.C. 534 at [74] (Lord Hope).

⁴⁶ See for instance: *R. v A (No.2)* [2001] UKHL 25; [2002] 1 A.C. 45; *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557.

the HRA.⁴⁷ Relying on a variant of the doctrine of precedent, domestic courts are able to argue that utilising their powers to interpret legislation in such a way is effectively *compelled* by the findings of unequivocal Strasbourg authority.⁴⁸ On the basis of such an approach courts are able to avoid accusations that the content of domestic human rights law is a product of overly imaginative judicial engineering, or rather less favourably, that it has simply been “made up.”⁴⁹ As a result, one of the dangers of rights adjudication—that judges will compromise their independence through overt law-making—is avoided: firstly by adopting a “precedential” approach to the Convention jurisprudence,⁵⁰ secondly by displaying a reluctance to attribute meaning to “the Convention rights” which does not find clear support in existing Strasbourg case-law.

The mirror model is also arguably partially congruous with the constitutional division of labour between the three branches of government. Consistently with the Labour Government’s intentions in implementing the HRA’s distinctive model of rights protection,⁵¹ the mirror model respects parliamentary sovereignty through recognising only those rights specified by Parliament in the HRA and—in turn—only to the extent clearly provided for by the European Court of Human Rights.⁵² In its application, the mirror model therefore reflects the sovereignty-driven notion that Parliament—and not the courts—should be the appropriate

⁴⁷ Take, for instance, the decision of Sullivan J in the Afghan Hijackers case (*R. (on the application of S) v Secretary of State for the Home Department* [2006] EWHC 1111). While the then Home Secretary, John Reid, was able to claim that Sullivan J’s decision was “bizarre and inexplicable” (“Ministers accused of fuelling myths on human rights”, *The Guardian*, 14 November 2006) the Court of Appeal commented that, “we commend the judge for an impeccable judgment. This history of this case ... has attracted a degree of opprobrium for those carrying out judicial functions. Judges and adjudicators have to apply the law as they find it, and not as they might wish it to be” (*R. (on the application of S) v Secretary of State for the Home Department* [2006] EWCA Civ 1157).

⁴⁸ On which see the comments of Baroness Hale in *Re P*: “... in all the cases in which either the interpretative duty in section 3 has been used, or a declaration of incompatibility made under section 4, it has been reasonably clear that the Strasbourg court would hold that United Kingdom law was incompatible with the Convention.” (*In Re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 A.C. 173 at [116] (Baroness Hale).).

⁴⁹ As suggested in: I. Loveland, “Making it up as they go along? The Court of Appeal on same-sex spouses and succession rights to tenancies” [2003] P.L. 222.

⁵⁰ R. Masterman, “Section 2(1) of the Human Rights Act 1998: binding domestic courts to Strasbourg?” [2004] P.L. 725.

⁵¹ HL Debs, Vol.582, Col.1228, 3 November 1997 (Lord Irvine of Lairg QC); HC Debs, Vol.306, Col.772, 16 February 1998 (Jack Straw MP).

⁵² *Brown v Stott* [2003] 1 A.C. 681, 703 (Lord Bingham).

author of legal frameworks of rights protection which extend, or are otherwise at variance with, the protections that would be afforded by the Strasbourg court.⁵³ Yet it is at this point that the weaknesses of the mirror model also begin to become apparent; the uncodified constitution has long recognised the limited law-making role of the judiciary.⁵⁴ The complete denial of even an incremental judicial law-making function (in the context of the meaning of “the Convention Rights” under the HRA) which would be the consequence of a rigid adherence to the mirror model is therefore difficult, if not impossible, to reconcile with the common law dimensions of the United Kingdom’s constitutional order.

The Constitutional Deficiencies of the Mirror Model

It is undoubted that the role of the domestic court under the HRA was—in part—to operate as a local proxy for the European Court of Human Rights, reducing the potential cost and delay associated with pursuing Convention-based litigation as far as Strasbourg.⁵⁵ But to suggest that the role of the court was *only* to so act reflects a incomplete understanding of the intentions behind the HRA: indications were also given in *Rights Brought Home* that the purpose of the HRA would permit the Convention Rights to be “subtly and powerfully woven into our law” (rather than to supplant it) and would enable the judiciary to “make a distinctively British contribution to the development of the jurisprudence of human rights in Europe” (rather than to passively reflect it).⁵⁶ In practice, the mirror model of interpretation oversimplifies the requirements of the both the Convention—a point that will be explored in more detail below—and of the HRA itself. Three constitutional difficulties can be identified; the first relates to the structural requirements of HRA adjudication, the second to the dynamic relationship between national authorities and the European Convention organs, and the third to the judicial obligation to consider each case on its merits.

As to the first of these, reasoning of the type seen in the House of Lords decisions in *Quark* and *Al-Jedda*—when deployed as a general principle applicable to the interpretation of

⁵³ *R. (on the application of Ullah) v Special Adjudicator; Do v Immigration Appeal Tribunal* [2004] UKHL 26; [2004] 2 A.C. 323 at [20] (Lord Bingham).

⁵⁴ Lord Reid, “The Judge as Law Maker” (1972-1973) 12 *Journal of the Society of the Public Teachers of Law* 22.

⁵⁵ *Rights Brought Home* (1997), Cm.3782 at [1.14].

⁵⁶ *Rights Brought Home* (1997), Cm.3782 at [1.14].

the HRA⁵⁷—gives insufficient recognition to the fact that the HRA creates a remedial structure which cannot be coherently explained by reference to the Convention alone. Elements of this structure have no heritage in either the Convention itself or its case-law; the notion of hybrid public authorities⁵⁸ and the declaration of incompatibility,⁵⁹ for instance, are purely domestic concepts that go directly to the scope and extent of the protections afforded by the HRA. The remedial capacity of the HRA is therefore as much a matter for domestic law as it is the Strasbourg jurisprudence: the approach of domestic courts to the boundary between legitimate statutory interpretation and impermissible amendment in the use of s.3(1) HRA, for instance, owes as much, or more, to local constitutional influences—the continuing relevance of the sovereignty doctrine and the fluctuating contours of the relationship between courts and Parliament—as it does to the strict requirements of the Convention as articulated by the Strasbourg court. Interpretations of where the line between permissible interpretation, and illegitimate legislative amendment, will lie, will of course differ. For the purposes of this particular argument, the precise point at which this line might be drawn is irrelevant; it is sufficient to acknowledge that concerns *other than those* originating in the Convention are material. In short, determining the specific requirements of the HRA in the context of a particular case is an analytical exercise that is linked to—but distinctive from—a court’s assessment of the perceived requirements of the Convention. The latter is relevant to the former, but only insofar as determining the meaning to be afforded to “the Convention Rights” in the domestic context. The mirror model of interpretation conflates these two levels of analysis, treating the requirements of the Convention as being synonymous with those of the HRA itself.

A further concern over the adoption by national courts of the mirror model of interpretation relates to the symbiotic relationship between national authorities and the Convention organs that is an expectation of the European Court of Human Rights. While the mirror model may—in part at least—be premised on the assumption that Parliament, and not the courts, should be the ultimate guarantor of human rights standards in the domestic

⁵⁷ As in *R. (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 A.C. 100 at [29] (Lord Bingham).

⁵⁸ Section 6(3)(b) HRA. See: *YL v Birmingham City Council* [2007] UKHL 27; [2008] 1 A.C. 95 at [4] (Lord Bingham).

⁵⁹ Section 4 HRA.

context, this distinction is from the perspective of the Convention bodies, largely irrelevant;⁶⁰ the Convention is binding on *the state*. As a result, it is at least arguable that “the ECHR’s injunction to further realise human rights and fundamental freedoms ... is addressed to domestic courts” as well as legislatures.⁶¹ The tendency of national courts to mirror the findings of the European Court of Human Rights deprives the latter court of one of the key indicators of emerging consensus (or otherwise) among Convention signatories⁶² and is inconsistent with the fact that “the machinery of protection established by the Convention is subsidiary to [the protections afforded within] national systems.”⁶³ A rigid adherence to the mirror approach to the application of the Convention jurisprudence therefore has the unintended consequence of distorting the dynamic nature of the relationship between the UK as a state party to the Convention and its governing court. This danger has been recognised by the Supreme Court in *Pinnock v Manchester City Council*:

This court is not bound to follow every decision of the European Court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European Court which is of value to the development of the Convention law ...⁶⁴

A precedent-like approach to the Strasbourg case-law undermines the upward influence of national courts in this dialogue, and gives credence to the suggestion that the Convention standards are European impositions—rather than the product of a collaborative exercise between national and supra national institutions—in so doing.

Finally, the application of any overriding principle which seeks to mirror liability under the Convention in the domestic context—that is, an approach which holds the potential to displace context-specific analysis of the relevancy and applicability of the available

⁶⁰ *In Re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 A.C. 173 at [32] (Lord Hoffmann); ‘Like all international tribunals, [the European Court of Human Rights] is not concerned with the separation of powers within the member state.’ See also: *R. (on the application of Countryside Alliance) v Attorney-General* [2007] UKHL 52; [2008] 1 A.C. 719 at [125] (Baroness Hale).

⁶¹ Judge S. K. Martens, ‘Incorporating the European Convention: the role of the judiciary’ [1998] E.H.R.L.R. 5, 14.

⁶² On which see: K. Dzehtsiarou, ‘Does consensus matter? Legitimacy of European Consensus in the case law of the European Court of Human Rights’ [2011] P.L. 534.

⁶³ *Handyside v United Kingdom* (1979-1980) 1 E.H.R.R. 737 at [48].

⁶⁴ *Manchester CC v Pinnock* [2010] UKSC 45, at [48]. See also ch.00, at pp.00-00.

Strasbourg case-law—will be susceptible to the same arguments that have been levelled against the perceived operation of a doctrine of deference in HRA adjudication. The accusation that courts might allow their judgment on human rights issues to be displaced by the generation of a doctrinal approach to deference—under which the independent decision-making capability of the courts is surrendered in acknowledgement of the supposedly superior credentials of the primary decision maker⁶⁵—finds a parallel in the suggestion that the purpose of the HRA is to replicate protections that would otherwise be enforced by the European Court of Human Rights. The effect of the mirror principle is that the obligation of the court to consider the case before it, and available authority, on its merits is constrained by the overriding concern to mimic the Strasbourg standards in the domestic context. As Lord Irvine has argued, “[s]ection 2 of the HRA means that it is our judges’ duty to decide the cases for themselves”⁶⁶ rather than to defer to the expertise, or authority, of a supposedly superior decision-maker. The exceptions that exist to the requirements imposed by the mirror principle may weaken this particular line of attack, but only insofar as the mirror metaphor extends to questions of the precedential force of Strasbourg authority. The restraints placed on the scope of the protections afforded under the HRA, and the extension of the mirror metaphor to the interpretation of the HRA scheme as a whole, both continue to operate as external constraints on the discretion of courts that find little—at best only partial—support in the text of the HRA itself.

As Tom Hickman has observed, the mirror model of interpreting the HRA has “crystallised into a powerful principle of purposive construction that has greatly influenced the Act’s interpretation and effect.”⁶⁷ Yet, the overarching approach advocated by the mirror model is based on but one of the motivating factors behind the enactment of the HRA. It can offer only an inadequate account of the overall constitutional purpose of the Act, and is therefore of dubious authority when (occasionally) presented as an authoritative statement of the Act’s objectives. In addition, it holds the potential to upset the relationship between national courts and the European Court of Human Rights and to present an obstacle to the

⁶⁵ For perhaps the most forceful rejection of such a doctrine, see: T. R. S. Allan, “Human Rights and Judicial Review: A Critique of Due Deference” [2006] C.L.J. 671. Cf. M. Hunt, “Sovereignty’s Blight: Why Contemporary Public Law needs the concept of ‘due deference’” in N. Bamforth and P. Leyland (eds), *Public Law in a Multi-Layered Constitution* (Oxford: Hart Publishing, 2003).

⁶⁶ Lord Irvine of Lairg, “A British Interpretation of Convention Rights” [2012] P.L. 237, 252.

⁶⁷ T. Hickman, *Public Law after the Human Rights Act* (Oxford: Hart Publishing, 2010), p.31.

effective discharge of the courts' obligations under the HRA. In short, the deficiencies of this overarching construction of the HRA are significant.

The Practical Inadequacy of the Mirror Model

In the context of *individual* judicial decisions, there may well be salient reasons underpinning reliance on a relevant Strasbourg decision or decisions and/or the endorsement by a domestic court that the standard of protection afforded by the European Court of Human Rights should be co-terminus with the level of protections afforded under the HRA. The utility of this presumption should not, however, be stretched unduly. During the parliamentary debates on the Human Rights Bill—while acknowledging that relevant jurisprudence and principles would generally be applied by domestic courts⁶⁸—Lord Irvine was careful to remind that Strasbourg authority could not be presumed to be directly-applicable in the domestic context:

Should a United Kingdom court ever have a case before it which is a precise mirror of one that has been previously considered by the European Court of Human Rights, which I doubt, it may be appropriate for it to apply the European Court's findings directly to that case; but in real life cases are rarely as neat and tidy.⁶⁹

Lord Irvine's concern—subsequently reflected in the House of Lords decision in *Gillan*⁷⁰—is revealing of a central weakness of the mirror metaphor; it relies on the false premise that Strasbourg jurisprudence is both suitable to be directly applied in a precedential manner and that it contains all the answers to the difficult questions that routinely arise at the domestic level. Each of these assumptions is open to question.

The particular characteristics of the Strasbourg jurisprudence

Early in the life of the HRA, Sir John Laws cautioned against the unquestioning adoption and application by domestic courts of the Strasbourg jurisprudence; the English court, he argued, should not be regarded as a "Strasbourg surrogate"⁷¹ whose job is to simply "add on the

⁶⁸ HL Debs, Vol.583, Cols.514-515, 18 November 1997 (Lord Irvine of Lairg Q.C.).

⁶⁹ HL Debs, Vol.584, Col.1270, 19 January 1998 (Lord Irvine of Lairg Q.C.).

⁷⁰ *R. (on the application of Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 11; [2006] 2 A.C. 307 at [23] (Lord Bingham).

⁷¹ *R. (on the application of ProLife Alliance) v British Broadcasting Corporation* [2002] 2 All ER 756 at [33].

Strasbourg learning to the corpus of English law.”⁷² The distinctive characteristics of the Strasbourg case-law present a range of difficulties for courts seeking to extract and apply Convention norms in the domestic context.⁷³ Three practical problems can be briefly highlighted.

First, the fact that the jurisprudence of the European Court is declaratory in nature—being indicative of a breach (or otherwise) of the Convention rather than specifying a particular course of remedial action—makes its application in the domestic context contingent on a degree of creativity on the part of national authorities, the courts included. As the Convention organs are “not seeking to harmonise constitutional traditions”⁷⁴ member states are free to determine the method of achieving compatibility in accordance with the rules of their national legal system in response to a finding by the European Court of a breach.⁷⁵ It is not an objective of the Convention system to supplant protections for legal rights already existent in the national system, but to re-enforce them. That the HRA was designed to be consistent with this notion is evident from the inclusion of s.11, which indicates that the rights available under the HRA should run in parallel with those already operative in domestic law.

Secondly, the promotion of a regimented relationship between domestic law, and the jurisprudence of the European Court of Human Rights—by definition a “shifting”⁷⁶ body of law which feeds on developments at the national level⁷⁷—is not without difficulty; decisions of the European Court of Human Rights might, over the course of time, be superseded by jurisprudential developments and therefore inapt to be followed or applied in any way.⁷⁸ Finally, the fact that the jurisprudence of the European Court of Human Rights is directed towards multiple jurisdictions and, in turn, has given rise to the margin of appreciation, raises concerns relating to the transferability of findings of the Strasbourg court between member states. Decisions in which the European Court of Human Rights has invoked the margin of

⁷² *Runa Begum v Tower Hamlets London Borough Council* [2002] 2 All ER 668 at [17].

⁷³ R. Masterman, “Taking the Strasbourg Jurisprudence into Account: developing a ‘municipal law of human rights’ under the Human Rights Act” (2005) 54 I.C.L.Q. 907, 915-918.

⁷⁴ A. Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1992), p.181.

⁷⁵ *Vermeire v Belgium* (1993) 15 E.H.R.R. 488.

⁷⁶ HL Debs, Vol.000, Col.1268, 19 January 1998 (Lord Browne-Wilkinson).

⁷⁷ *Stafford v United Kingdom* (2002) 35 E.H.R.R. 32 at [68].

⁷⁸ *R. (on the application of Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2011] 3 W.L.R. 836.

appreciation are—for instance—heavily conditioned by factors prevalent in the respondent state and should not be assumed to be directly applicable elsewhere.

Each of these distinctive characteristics of the Strasbourg case law points towards the conclusion that the processes of integrating the Convention jurisprudence into the existing body of domestic common and statute law is therefore—or should be—far from a straightforward task.⁷⁹ In addition to addressing questions of practical and temporal relevance and applicability, domestic courts should actively “take into account” the jurisdictional, fact-sensitive and declaratory dimensions of potentially applicable European Court decisions in order to fashion a coherent reading of the requirements of the Convention. It is from this basis that a court’s subsequent assessment of how, or whether, this reading can be given effect to—and set a domestic precedent—via the HRA should proceed. The central weakness of the mirror model of interpretation is that this complex process of reconciliation is distilled into a series of binary questions—of whether to straightforwardly follow or not, of how to provide “no less” but “no more” protection than Strasbourg—that cannot provide coherent responses to the more difficult questions posed by the courts’ attempts to give effect to their obligations under the HRA. A series of examples will illustrate this point in practice.

Unclear authority and the mirror model

While the mirror model might be argued to provide reinforce the reasoning of domestic courts where clear and constant authority can be relied upon, at the level of individual judicial decision-making an overly-rigid adherence to the mirror ideal holds the potential to exercise a disempowering effect on the ability of courts to provide a remedy or adequate answer to the legal problem arising. The response of the House of Lords to those areas in which clear guiding authority at the Strasbourg level has been lacking demonstrates the inability of the mirror approach to provide an adequate framework from which judicial analysis can proceed. In the House of Lords decision in *N v Secretary of State for the Home Department*, for example, the Law Lords’ survey of the Strasbourg jurisprudence concluded that the relevant authority was “not in an altogether satisfactory state”, lacked “its customary clarity” and

⁷⁹ C. A. Gearty, “Tort Law and the Human Rights Act” in T. Campbell, K. D. Ewing and A. Tomkins, *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001), pp.252-253.

displayed evidence of reasoning that was not “entirely convincing.”⁸⁰ Yet, as Lord Hope argued:

Our task, then, is to analyse the jurisprudence of the Strasbourg court and, having done so and identified its limits, to apply it to the facts of this case ... It is not for us to search for a solution ... which is not to be found in the Strasbourg case law. It is for the Strasbourg court, not for us, to decide whether its case law is out of touch with modern conditions and to determine what further extensions, if any, are needed to the rights guaranteed by the Convention. We must take the case law as we find it, not as we would like it to be.⁸¹

The apparent consequence of this particular dynamic of the mirror model is to either require the perceived deficiencies of the Strasbourg case-law to be replicated, or otherwise leave the domestic court powerless to take remedial action in translating the relevant authority into the domestic setting.

Where a domestic court is confronted with an issue on which *no* relevant Strasbourg jurisprudence is available, the House of Lords has indicated that a measure of “self-restraint” is required, “lest we stretch our own jurisprudence beyond that which is shared by all the states parties to the Convention.”⁸² Such a view is grounded in the view that the meaning of the Convention should be uniform throughout the Council of Europe, and that the HRA rights merely replicate those rights enforced by the European Court of Human Rights. While defended on grounds of respect for the European Court of Human Rights as the ultimate interpreter of the Convention standards,⁸³ this particular aspect of the mirror model holds the potential to preclude domestic courts from providing adequate responses to the legal questions arising before them. The suggestion that the courts should approach those areas in

⁸⁰ *N v Secretary of State for the Home Department* [2005] UKHL 31; [2005] 2 A.C. 296 at [11], [14] (Lord Nicholls) and at [91] (Lord Browne of Eaton-under-Heywood).

⁸¹ *Ibid.* at [25] (Lord Hope).

⁸² *R. (Clift) v Secretary of State for the Home Department* [2006] UKHL 54; [2007] 1 A.C. 484 at [49] (Lord Hope of Craighead).

⁸³ *R. (on the application of Ullah) v Special Adjudicator; Do v Immigration Appeal Tribunal* [2004] UKHL 26; [2004] 2 A.C. 323 at [20] (Lord Bingham); *Ahmed v HM Treasury* [2010] UKSC 5; [2010] 2 A.C. 534 at [74] (Lord Hope).

which clear Strasbourg authority is lacking as “no go areas”⁸⁴ tantamount to being non-justiciable has provoked Lord Kerr to lament the “*Ullah*-type reticence” under which “it is not only considered wrong to attempt to anticipate developments at the supra national level of the Strasbourg court, but ... that we should not go where Strasbourg has not yet gone.”⁸⁵ In the Supreme Court decision in *Ambrose v Harris* Lord Kerr argued:

... it is the duty of this and every court not only to ascertain “where the jurisprudence of the Strasbourg court clearly shows that it currently stands” but to resolve the question of whether a claim to a Convention right is viable or not, even where the jurisprudence of the Strasbourg court does not disclose a clear current view.⁸⁶

The HRA conclusively put paid to the suggestion that questions relating to the Convention Rights fell outside the competence of the domestic judiciary;⁸⁷ it would be an unusual result of the implementation of the HRA if it were to perpetuate argument that Convention issues are effectively non-justiciable in those areas where no directly-applicable Strasbourg authority is available.

Conflicting authority and the mirror model

Nor can the mirror model of interpretation provide an adequate explanation of how courts should respond to conflicting Strasbourg case-law. In the case of *Animal Defenders International* the House of Lords was asked to adjudicate on the compatibility of the prohibition on political advertising in s.321(2) of the Communications Act 2003 with the Article 10 right to freedom of expression. Two potentially applicable decisions of the European Court of Human Rights were raised in argument. The first of these—*VgT Verein gegen Tierfabriken v Switzerland*⁸⁸—provided authority for the suggestion that a blanket ban on advertising for political ends would be a disproportionate interference with freedom of expression. The second—*Murphy v Ireland*⁸⁹—suggested that a restriction on advertising for

⁸⁴ J. Lewis, “The European Ceiling on Rights” [2007] P.L. 720, 732.

⁸⁵ *Ambrose v Harris* [2011] UKSC 3; [2011] 1 W.L.R. 2435, at [126]. See also: Lord Kerr, “The UK Supreme Court—The Modest Underworker of Strasbourg?”, Clifford Chance Lecture, 25 January 2012.

⁸⁶ *Ambrose v Harris* [2011] UKSC 3; [2011] 1 W.L.R. 2435, at [129]. Cf. at [18]-[20] (Lord Hope).

⁸⁷ *R. v Secretary of State for the Home Department, ex parte Brind* [1991] 1 A.C. 696.

⁸⁸ *VgT Verein gegen Tierfabriken v Switzerland* (2002) 34 EHRR 4.

⁸⁹ *Murphy v Ireland* (2004) 38 EHRR 13.

religious purposes would fall within the range of reasonable responses available to states under the margin of appreciation doctrine.

In declining to grant the declaration of incompatibility requested by the applicants, the House of Lords opted to place reliance on *Murphy v Ireland*, which—given that its subject matter was a prohibition on *religious* advertising—was arguably the less factually relevant of the two decisions. The Law Lords used *Murphy* to illustrate that a consensus amongst the contracting states was lacking, and that—as a result—a margin of appreciation would be afforded to the regulatory decisions of national authorities in this field. On the basis of this supposed margin of appreciation, the Law Lords were able to find that “great weight”⁹⁰ should be attributed to Parliament’s decision to ban political advertising in full knowledge of the potential inconsistency of the prohibition with at least one decision of the European Court of Human Rights. In this latter respect at least, the decision of the House of Lords is almost certainly correct; the HRA places no bar on Parliament legislating in a way which is potentially inconsistent with “the Convention Rights.” Yet in order to reach this point—hamstrung by their own presumption in favour of the application of relevant and clear authority—the Law Lords reasoning provides an unconvincing defence of why the clear and relevant decision in *VgT*—arising on facts which, as Lord Bingham acknowledged, were “very similar to those in the present case”⁹¹—was not followed. On its face, s.2(1) provides courts with the flexibility needed to consider and weigh up the merits of potentially conflicting Strasbourg authority, permitting courts to assess the relevancy of potentially applicable—and potentially contradictory—decisions. The rudimentary questions posed by the mirror model of interpretation, in this instance, proved unable to underpin a coherent judicial response.

The Increasing Inaccuracy of the Mirror Metaphor

The case against the perpetuation of the mirror model becomes more compelling when account is taken of the increasing evidence illustrating further departures from the notion that the Strasbourg and domestic protections should mirror each other in both form and substance. That many of these departures cannot be explained by reference to the so-called exceptions to the principle indicates that to speak of domestic law as straightforwardly replicating the

⁹⁰ *R. (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 A.C. 1312 at [33] (Lord Bingham).

⁹¹ *R. (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 A.C. 1312 at [9] (Lord Bingham).

requirements of the Convention provides an inaccurate encapsulation of the processes of judicial reasoning—and their outcomes—in HRA adjudication. In this sense, the mirror principle unfairly implies an uncritical attitude to the Strasbourg authority that is largely absent from the recent record of the courts under the HRA. While *AF* demonstrates that the precedential weight of a decision of the Grand Chamber of the European Court of Human Rights remains considerable,⁹² *Horncastle* confirms that such authority—even “a clear statement of principle ... in respect of the precise issue” before the domestic court—will not be regarded as being determinative as a matter of course.⁹³ But a focus on such cases—where the requirements of, and exceptions to, the presumption in favour of adherence to Strasbourg authority are explicit considerations—distracts from a crucial point; that the stated exceptions to the mirror model of interpretation are unequal to the task of facilitating the ordered reconciliation of domestic and Strasbourg authority.

Limited Authority and the mirror model

The impossibility of sustaining an adherence to the mirror principle becomes most obvious in those areas in which domestic courts are operating within a context where the relevant and applicable Convention jurisprudence provides only partial support for the decision eventually taken. While a strict adherence to the mirror model would not seem to sanction building on, or developing, nominally applicable—though insubstantial—authority,⁹⁴ notable examples exist of domestic courts pursuing exactly this type of creative reasoning. In the House of Lords decision in *Limbuela*, the “only approximately relevant authority”⁹⁵ at the Strasbourg level was the admissibility decision in *O’Rourke v United Kingdom*.⁹⁶ The treatment, by the European Court of Human Rights, of the relevant law in *O’Rourke* runs to a mere four paragraphs, yet on the basis of that slight authority the House of Lords was not only able to fashion a remedy, but was able to arguably extend the scope of protection offered by Article 3 of the Convention in the domestic context in so doing.⁹⁷

⁹² *Secretary of State for the Home Department v AF* [2009] UKHL 28; [2009] 3 W.L.R. 74.

⁹³ *R. v Horncastle* [2009] UKSC 14; [2010] 2 A.C. 373 at [11] (Lord Phillips).

⁹⁴ *N v Secretary of State for the Home Department* [2005] UKHL 31; [2005] 2 A.C. 296 at [25].

⁹⁵ C. Warbrick, “The European Convention on Human Rights and the Human Rights Act: the view from the outside” in H. Fenwick, G. Phillipson and R. Masterman, *Judicial Reasoning under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2007), p.48.

⁹⁶ *O’Rourke v United Kingdom* (2001) ECtHR No.39022/97.

⁹⁷ J. Lewis, “The European Ceiling on Rights” [2007] P.L. 720, 736.

Campbell v Mirror Group Newspapers provides a further illustration of exactly the type of progressive judicial reasoning that a strictly-construed mirror principle would apparently preclude. Prior to the decision in *Campbell*, the question of whether the Convention required member states to make available remedies for breaches of Article 8 caused by private persons was a “difficult question” to which “Strasbourg case law provide[d] no definitive answer.”⁹⁸ While the decision of the European Court of Human Rights in *Peck v United Kingdom*⁹⁹ had concerned the interference with Article 8 rights by the *state*, the only relevant decision on the particular *horizontal* application of Article 8 was in the form of the admissibility decision of *Spencer v United Kingdom*.¹⁰⁰ Yet in *Campbell* the House of Lords was, by a majority, able to find that the requirements of the Convention Rights were such that a remedies should be made available, *in advance* of a conclusive decision on point from the European Court of Human Rights.¹⁰¹

In both *Limbuela* and *Campbell*, the available Strasbourg authority provided only limited support for the decision taken by the House of Lords, in both the Law Lords were able to resolve questions of law to which the Strasbourg jurisprudence provided no complete answer.¹⁰² Such decisions are, of course, entirely consonant with the incrementally progressive approach of the common law court and serve to highlight the fact that ultimately the strict requirements of the mirror model of interpretation are inconsistent with the limited creative role that is afforded to courts by the constitution.¹⁰³

The integration of Convention and Common Law

⁹⁸ G. Phillipson, “Judicial Reasoning in Breach of Confidence Cases under the Human Rights Act: Not taking privacy seriously?” [2003] EHRLR (*Special Issue: Privacy 2003*) 54, 57.

⁹⁹ *Peck v United Kingdom* (2003) 36 EHRR 41.

¹⁰⁰ *Spencer v United Kingdom* (1998) 25 EHRR CD105.

¹⁰¹ Such a decision did not come from the European Court of Human Rights until *Von Hannover v Germany* (2005) 40 EHRR 1, handed down a month after the decision of the House of Lords in *Campbell v MGN*.

¹⁰² See also: *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64; [2009] 1 A.C. 1198.

¹⁰³ Tom Hickman has suggested that decisions such as these should not be regarded as a repudiation of the mirror model: “... such departures are necessary incidents of domestic courts having a jurisdiction to remedy violations of the European Convention. They are consistent with the domestic courts seeking to provide a remedy which would be provided if the claimant were to go all the way to Strasbourg.” (T. Hickman, *Public Law after the Human Rights Act* (Oxford: Hart Publishing, 2010), p.39).

In those areas in which the common law and the Convention run in train, the mirror metaphor again oversimplifies the processes of reconciling the demands of the Convention rights with established doctrines, both as a matter of substance and of judicial technique. A strict adherence to the mirror principle would see established domestic principles overridden in the name of replicating the Strasbourg rights at the national level. Yet the character of the common law has, for the most part, been preserved rather than usurped by the application of “the Convention rights.”¹⁰⁴ Even in that area of the common law where the influence of the Convention has been most palpable—the protection of personal privacy—change has been both incremental and arguably not fully reflective of the protections offered by the European Court of Human Rights. The development of the action of breach of confidence has certainly been marked—and clearly driven by the perceived requirements of Articles 8 and 10 of the Convention—but it is notable also for highlighting a series of inaccuracies relating to the so-called mirror principle.

While courts have sought to give effect to the requirements of Article 8 (and indeed Article 10) in the domestic context, domestic courts have consciously avoided declaring that the HRA requires the creation of a free-standing action for infringement of personal privacy.¹⁰⁵ Instead, a recalibrated breach of confidence doctrine has been the vehicle by which the Convention standards have been transferred into domestic law. This cause of action has, in the words of one commentator, developed to “precisely mirror” the protections for personal information found in Article 8 of the Convention.¹⁰⁶ Yet, on closer inspection, the relationship between domestic privacy protections and those provided by the Convention has not been as neat and tidy as this assessment would immediately suggest. In the first instance, early decisions on breach of confidence eschewed application of the Article 8 case-law and saw the adoption of a test of offensiveness originating in the decision of the Australian High Court decision of *Australian Broadcasting Corporation v Lenah Game Meats*.¹⁰⁷ Domestic courts “took their lead” not from Strasbourg, but from a comparable common law jurisdiction. More recent decisions demonstrate an equally uneven record. We have already seen that in one sense the House of Lords decision in *Campbell v MGN* pre-

¹⁰⁴ See: J. Steele, “(Dis)owning the Convention in the Law of Tort” in J. Lee (ed.), *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Oxford: Hart Publishing, 2010).

¹⁰⁵ *Wainwright v Home Office* [2003] UKHL 53; [2004] 2 A.C. 406.

¹⁰⁶ T. Hickman, *Public Law after the Human Rights Act* (Oxford: Hart Publishing, 2010), p.55.

¹⁰⁷ *Australian Broadcasting Corporation v Lenah Game Meats* [2001] HCA 63. See for instance: *A v B plc* [2002] EWCA Civ 337; [2003] Q.B. 195.

empted the decision of the European Court of Human Rights in *Von Hannover v Germany*, yet it is also arguably the case that another aspect of that case—the expansive reading of Article 8 adopted by the European Court—has not been fully embraced by domestic courts.¹⁰⁸

The public law sphere provides further examples of the inability of the mirror metaphor to accurately encapsulate developments since the enactment of the HRA, with the integration of proportionality into English public law providing a useful illustration. Determining whether a given restriction on a qualified right satisfies the Convention requirements of necessity and proportionality cannot be coherently informed by the objective of mirroring the perceived requirements of the Strasbourg case law. In this regard the text of the Convention can at best provide a series of analytical questions from which domestic judicial inquiry can proceed; is the contested limitation prescribed by law? Is it in pursuance of a legitimate aim? The Strasbourg case law cannot provide answers to these questions in the abstract. Instead domestic courts are required to make their own assessment of concepts such whether the limitation answers a “pressing social need” and whether it is “necessary in a democratic society.”¹⁰⁹ Answers to these questions are, of course, heavily contextual. The Convention and its case law can only provide a framework around which a domestic court might structure its decision-making process. Yet even in this role, the Convention jurisprudence has proved only to be of limited assistance.

As a result of the failure of the European Court of Human Rights to articulate a consistent, structured, approach to questions of proportionality,¹¹⁰ domestic courts have

¹⁰⁸ The formal obstacle to domestic courts adopting the reading of Article 8 put forward in *Von Hannover* is, of course, the ruling of the House of Lords—in *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 A.C. 465—that the domestic doctrine of precedent has not been altered by the enactment of the HRA. In the context of misuse of private information *Campbell* remains authoritative, as a matter of domestic law. This has not, however, prevented numerous lower courts from wrestling with the implications of *Von Hannover* for domestic privacy protection. See eg: *Mosley v News Group Newspapers* [2008] EWHC 1777 (QB); [2008] E.M.L.R. 20; *Murray v Express Newspapers Plc* [2008] EWCA Civ 446; [2009] Ch. 481. On which see: G. Phillipson, “Privacy: the development of breach of confidence—the clearest case of horizontal effect?” in D. Hoffman (ed.), *The Impact of the UK Human Rights Act on Private Law* (Cambridge: Cambridge University Press, 2011), pp.142-146.

¹⁰⁹ See eg: *Handyside v United Kingdom* (1979-80) 1 E.H.R.R. 737 at [48], where—consistently with the position of the Strasbourg organs as a secondary layer of rights protection—the European Court conceded that “it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of ‘necessity’ in this context.”

¹¹⁰ See e.g.: *R. v Shayler* [2002] UKHL 11; [2003] A.C. 247 at [60] (Lord Hope); R. Clayton, “Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle” [2001] E.H.R.L.R. 504, 510-12.

sought guidance from elsewhere. The leading House of Lords case of *R. (on the application of Daly) v Secretary of State for the Home Department*¹¹¹ saw Convention authority rejected in favour of the test of proportionality adopted by the Privy Council in *de Freitas*.¹¹² *Daly*—itself a case concerning rights existent at common law—saw the *de Freitas* test endorsed as the appropriate standard of review in adjudication concerning the Convention rights and has been endorsed as such in subsequent decisions.¹¹³ While the post-HRA standard of review employed by domestic law might well be broadly consistent with the expectations of the European Court,¹¹⁴ the techniques employed to achieve this consistency—in particular in drawing on and incrementally refining Commonwealth and other jurisprudence from beyond the Convention system¹¹⁵—more in common with the established techniques of common law development than with any attempted mirroring of Strasbourg case law in the domestic context.¹¹⁶

The reasonably-foreseeable development

While initial indications suggested that it was not for courts to “pre-empt”¹¹⁷ Strasbourg where a domestic court suspected that a European Court of Human Rights decision was outdated, out of line with the emerging European consensus, or failed to fully resolve the issue to be determined, recent cases have indicated a subtle change of direction. The possibility of the courts using their limited creative powers to engineer a “reasonably

¹¹¹ *R. (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 A.C. 532.

¹¹² *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing* [1999] 1 A.C. 69, 80 (Lord Clyde): “... whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.”

¹¹³ See e.g.: *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 A.C. 167; *E v Chief Constable of the Royal Ulster Constabulary* [2008] UKHL 66; [2009] 1 A.C. 536.

¹¹⁴ Though in practice see: *S v United Kingdom* (2009) 48 E.H.R.R. 50; *Gillan and Quinton v United Kingdom* (2010) 50 E.H.R.R. 45.

¹¹⁵ See e.g.: *R. (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 A.C. 532 at [27]-[28]; *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 A.C. 167 at [19]-[20];

¹¹⁶ For a similar observation—made in the context of EU law—see: *R. (on the application of Sinclair Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437 at [82].

¹¹⁷ *M v Secretary of State for Work and Pensions* [2006] UKHL 11 at [30] (Lord Nicholls).

foreseeable” development of the law in this regard was raised obliquely in the speech of Baroness Hale in *Gentle*:

Parliament is free to go further than Strasbourg if it wishes, but we are not free to foist upon Parliament or upon public authorities an interpretation of a Convention right which goes way beyond anything which we can reasonably foresee that Strasbourg might do.¹¹⁸

While at pains to stress the institutional competence issues in such a proposed development, Baroness Hale’s careful use of hyperbole does appear to suggest that it may well be open to courts to put forward an interpretation of a Convention right which incrementally develops, in a reasonably foreseeable way, pre-existing Strasbourg case-law.¹¹⁹

Predictive reasoning of this sort was in evidence in the decision of the House of Lords in *Re P*.¹²⁰ *Re P* has been hailed as confirming an exception to the mirror principle in those areas where the European Court has held that the margin of appreciation applies,¹²¹ it also provides evidence of the highest court engaging in a degree of overt speculation over how—if confronted with a similar case—the European Court of Human Rights might respond.¹²² While such decisions might be presented as a pragmatic domestic response to areas of uncertainty within the Convention jurisprudence consistent with the *general* principle in favour of applying relevant Strasbourg authority,¹²³ they appear to depart from the suggestion that it is not for domestic courts to provide answers to legal problems which cannot be found in the Strasbourg case-law.¹²⁴ Questions of institutional competence are central to this particular inquiry, with the creative abilities of the courts—the power of the courts to

¹¹⁸ *R. (on the application of Gentle and another) v Prime Minister* [2008] UKHL 20; [2008] 1 A.C. 1356 at [56]. See also: *R. (on the application of Countryside Alliance) v Attorney-General* [2007] UKHL 52; [2008] 1 A.C. 719 at [125] (Baroness Hale).

¹¹⁹ Incidentally, the legitimacy of “reasonably foreseeable” development of the law (engineered by the courts) would also appear to gain support from the European Court of Human Rights: *SW v United Kingdom*; *CR v United Kingdom* (1996) 21 E.H.R.R. 363.

¹²⁰ *In Re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 A.C. 173.

¹²¹ J. Lewis, “*In Re P and others*: an exception to the ‘no more, certainly no less’ rule” [2009] P.L. 43.

¹²² *In Re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 A.C. 173 at [27] (Lord Hoffmann), [53] (Lord Hope). Cf Lord Walker at [82].

¹²³ T. Hickman, *Public Law after the Human Rights Act* (Oxford: Hart Publishing, 2010), p.39.

¹²⁴ *N v Secretary of State for the Home Department* [2005] UKHL 31; [2005] 2 A.C. 296 at [25] (Lord Hope).

generate outcomes that are respectful of, though not strictly mandated by, the Convention jurisprudence—arguably greater in those areas of domestic law where the common law applies or those areas where the influence of the Convention is conditioned by a margin of appreciation. So long as those creative powers are exercised compatibly with the tenor of the Strasbourg case law,¹²⁵ and with the incremental law-making powers bestowed upon judges by the constitution,¹²⁶ s.2(1) imposes no bar on their use.

Conclusion—The False Premise of the Bill of Rights Debate?

The mirror principle remains a paradox at the heart of the judicial approach to the interpretation and application of the HRA. The highest courts have consistently pronounced the HRA to be a constitutional measure, requiring ‘generous and purposive interpretation.’¹²⁷ Simultaneously, the mirror metaphor—emerging out of a constraining reading of s.2(1) and of the HRA itself—has presented a quiet, formalist, obstacle to the effective realisation of this lofty ambition. As we have seen however, the notion that domestic protections should mirror their Strasbourg counterparts is flawed, both constitutionally and practically; with the mirror metaphor reflecting an overly narrow interpretation of the HRA and proving in its implementation unequal to the task of permitting the orderly transition of Strasbourg authority into domestic law. The principles of interpretation associated with the mirror principle can, at best, provide only a basic explanation of the reasoning processes that have sought to give effect to the substantive protections afforded by the HRA. The binary distinctions that are at its core—to follow or not; to do no less, but no more, than the Convention jurisprudence requires—cannot provide adequate responses to the complex processes of reconciling the demands of the Convention Rights with domestic statute and common law. Increasingly, signs are visible that the strictures imposed by the mirror model of interpretation are loosening, and that an approach to the meaning of the “Convention rights” which is consonant with the domestic separation of powers—and therefore recognises the legitimacy of the limited definitional role played courts in giving meaning to those rights—is beginning to gain credence. As a result, the evidence in favour of the slow

¹²⁵ R. Masterman, “Taking the Strasbourg Jurisprudence into Account: developing a “municipal law of human rights” under the Human Rights Act” (2005) 54 I.C.L.Q. 907, 917-921.

¹²⁶ On which see: G. Phillipson and A. Williams, “Horizontal Effect and the Constitutional Constraint” (2011) 74 M.L.R. 878, 887-890.

¹²⁷ See e.g.: *R. v DPP, ex parte Kebeline* [2000] 2 A.C. 326, 375 (Lord Hope); *Brown v Stott* [2003] 1 A.C. 681, 703 (Lord Bingham).

emergence of a distinctly domestic body of human rights law is a more tenable suggestion than the straightforward reflection of the mirror metaphor would have us believe.

Yet the political currency of the mirror principle remains well-established. The perception that domestic courts are inflexibly bound to adhere to the rulings of the European Court of Human Rights continues to manifest itself in the debates on whether a national Bill of Rights might be more responsive to ‘British’ rights than the HRA,¹²⁸ and has undoubtedly fuelled calls for the United Kingdom to extract itself from the Convention system in order to escape what have been referred to by one former Law Lord as the ‘occasional extravagances of the Strasbourg Court.’¹²⁹ The Conservative drive to repeal the HRA, or to replace it with a more non-European rights instrument, is therefore premised in part on continued influence and acceptance of the mirror metaphor and the parallel suggestion that domestic institutions are rendered ‘subservient’¹³⁰ to the European Court of Human Rights through the combined efforts of the Convention system and the HRA. It would be unfortunate to say the least if, in spite of the increasing evidence in favour of the dilution of the mirror principle, continued perceptions of rigidity and undue deference to Strasbourg contributed to the premature demise of the HRA.

¹²⁸ ‘A pincer movement on No 10’, *Independent on Sunday*, 20 February 2011.

¹²⁹ HL Debs, Vol.000, Col.709 (18 October 2010), per Lord Scott of Foscote. See also: Lord Hoffmann, ‘The universality of human rights’ (2009) 125 L.Q.R. 416; M. Pinto-Duschinsky, *Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK* (London: Policy Exchange, 2011).

¹³⁰ M. Pinto-Duschinsky, *Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK* (London: Policy Exchange, 2011), p.17.